

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NWDC RESISTANCE and COALITION OF
ANTI-RACIST WHITES,

Plaintiffs,

v.

IMMIGRATION & CUSTOMS
ENFORCEMENT, et al.,

Defendants.

No. 3:18-cv-05860-JLR

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO SEAL**

Pursuant to Local Rule 5(g), Defendants submit this response to Anti-Racist Whites and La Resistencia's motion to seal, Dkt. 168. Among the documents identified in the organizations' motion, Defendants do not seek to seal, redact, or otherwise restrict Exhibits 1, 27, and 40 to the Declaration of Chris Swift, Dkt. 167. As further explained below, Defendants seek to protect information in the remaining exhibits identified in the motion to seal and request that this Court either restrict access to these documents as it would in a typical immigration case brought in this District, seal these documents, or otherwise protect certain non-party information through redactions or partial sealing. Depending on how the Court rules, Defendants request commensurate protection of the currently sealed information reflected by redactions in the organizations' opposition to Defendants' motion for summary judgment, Dkt. 174.

1 However, Defendants note that this Court may rule in Defendants' favor on the pending
2 motion for summary judgment without ever reaching the issues in this motion.¹

3 A. INTRODUCTION AND BACKGROUND

4 As this Court is aware, this is a case brought by two organizations alleging that "[s]ince
5 January 2017, ICE has engaged in a pattern and practice of selectively enforcing immigration
6 laws against outspoken immigrant rights activists who publicly criticize U.S. immigration law,
7 policy, and enforcement." Dkt. 13 ¶ 9. They claim an organizational injury, and no individual
8 person is a plaintiff. Defendants moved for summary judgment on the remaining Due Process,
9 APA, and First Amendment claims. *See* Dkts. 161, 175.

10 In support of their opposition to summary judgment, the organizations filed a number of
11 exhibits containing otherwise confidential non-party immigration information, for example, I-213
12 forms, and excerpts of deposition transcripts discussing these forms and other non-party
13 immigration information. *See* Swift Decl. ¶¶ 3-63 (describing Exhibits). Non-party immigration
14 information and other protectable information concerning non-parties and federal employees was
15 produced under the Protective Order in this case.

16 The parties have met and conferred multiple times. Plaintiffs' counsel spoke with
17 Defendants' counsel by phone on November 27, 2023, after which the motion to seal was filed.
18 Counsel for the parties spoke again by telephone on November 29, 2023, during which time
19 Defendants' counsel asked if any non-party consented to the public release of their immigration
20 information in this litigation. Counsel communicated by email, and then by telephone on
21 December 11, 2023, and have reached a general agreement to redact certain information

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23 ¹ Among other paths for dismissal, this Court could grant summary judgment based on Defendants' arguments under
24 *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022) or the APA without needing to consider any of the information
currently under seal, or because the publicly filed information reflected in Dkt. 174 demonstrates that what may be
filed under seal would not establish a pattern and practice or support any claim, and/or based on the organizations'
failure to address the mandatory permanent injunction factors.

concerning non-public, non-high-ranking ICE employees, though a final agreement has not been reached.

B. ARGUMENT

“There is a strong presumption of public access to the court’s files” in this District, and a party seeking to seal a record has the burden to “overcome this policy and the presumption.” LCR 5(g); *see also Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 677-78 (9th Cir. 2010) (holding that the “compelling reasons” standard applies to motions to seal judicial records). In applying the “compelling reasons” standard, “[t]he court must [] ‘conscientiously balance[] the competing interests of the public and the party who seeks to keep certain judicial records secret.’” *Ctr. for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016) (quoting *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)). “What constitutes a ‘compelling reason’ is ‘best left to the sound discretion of the trial court.’” *Id.* (quoting *Nixon v. Warner Commc’ns*, 435 U.S. 589, 599 (1978)). Some examples of “compelling reasons” may include “when a court record might be used to ‘gratify private spite or promote public scandal,’” or “to circulate ‘libelous statements’” or “‘as sources of business information that might harm a litigant’s competitive standing.’” *Id.* (quoting *Nixon*, 435 U.S. at 598-99).

Parties seeking to seal documents in this District must provide an explanation of: “(i) the legitimate private or public interests that warrant the relief sought; (ii) the injury that will result if the relief sought is not granted; and (iii) why a less restrictive alternative to the relief sought is not sufficient.” LCR 5(g)(3)(B).

Here, there are two types of third-party privacy interests implicated by the documents filed under seal, which are addressed in the contemporaneously filed declaration of Robert Guadian (“Guadian Decl.”). First is the privacy interest of non-parties in their own personal immigration information. These immigrants, who have never been parties to this litigation, have an interest in

1 keeping certain personal, sensitive immigration information shielded from the public's view.
2 Defendants understand that no non-party has consented to the release into the public domain of
3 their otherwise private immigration records, or communications and discussions about their
4 immigration records or proceedings that Defendant produced under a Protective Order to the
5 organizations in this litigation. Defendants have an interest in not exposing sensitive information
6 about non-parties into the public unless absolutely necessary.

7 A person's privacy interest in their immigration records is reflected in Federal Rule of
8 Civil Procedure 5.2(c), which limits access to records in immigration cases, and Local Rule 5.2,
9 which notes that immigration "actions are entitled to special treatment due to the prevalence of
10 sensitive information." This privacy interest and the government's role in protecting it is reflected
11 in *DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Personally*
12 *Identifiable Information* (May 4, 2022), which applies to individuals regardless of immigration
13 status. *See* Guadian Decl. ¶ 6, Ex. A.

14 The second privacy interest at issue belongs to federal employees who are not public
15 facing. As extensively detailed in the Guadian Declaration, ICE has seen a significant increase in
16 the level of threats and harassment directed to its personnel nationwide and in the Northwest. *Id.*
17 ¶¶ 10-32, Exs. B-C. ICE employees in the Seattle Field Office have been doxed. *See id.* ¶¶ 11-12,
18 Ex. B. As the examples in the Guadian Declaration reflect, Defendants' concerns about federal-
19 employee safety and doxing are real and concrete rather than merely hypothetical. Defendants
20 have sought to balance this interest against the public's interest in access to judicial records by
21 seeking an agreement to *redact* rather than seal certain federal-employee information. The parties
22 have reached a general agreement to redact the names and other PII of non-public, non-high-
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24

1 ranking ICE employees. This information need not be disclosed for the Court to consider the
2 issues on summary judgment. *See* LCR 5(g)(B).²

3 **A. As an alternative to sealing, this Court should protect the records under**
4 **Federal Rule 5.2 and LCR 5.2**

5 Consistent with the instruction in LCR 5(g)(1) to “explore all alternatives to filing a
6 document under seal,” ICE proposes that, rather than seal, this Court issue an order directing that
7 the exhibits filed in this case containing and discussing non-party immigration information be
8 protected under Federal Rule 5.2 and LCR 5.2. Had this case been brought by an individual or
9 even as a putative class action, such protections may have applied even though the individual
10 plaintiff(s) or petitioner(s) would have put their immigration records at issue. Here, the non-parties
11 have not put their own immigration records at issue. As far as Defendants know, the non-parties
12 have not consented to the public dissemination of their immigration records.³ However, as
13 indicated in the organizations’ opposition, they seek to litigate a series of mini-trials challenging
14 individual immigration enforcement actions. For these reasons, the protections of Federal Rule
15 5.2 and LCR 5.2 are warranted and may provide an alternative to sealing.

16 Defendants suggested this approach to Plaintiffs, but the parties did not reach an
17 agreement. Should this Court treat the exhibits as protected by Federal Rule 5.2 and LCR 5.2, that
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20 ² This general agreement was reached as of December 11, 2023, following multiple communications and conferences.
21 Defendants are contemporaneously filing an appendix *under seal* indicating which parts of the exhibits currently filed
22 under seal ICE believes reflect federal-employee information that should be redacted or sealed. Once the parties reach
23 an agreement on specific redactions, Defendants will update the Court.

24 ³ Defendants are aware that some non-parties have filed declarations in connection with this litigation. They have
discussed their own immigration cases in these declarations. However, Defendants have repeatedly asked Plaintiffs
if these individuals consent to the public release of their immigration records and information produced under a
Protective Order and have not yet obtained any consent. If a non-party consents to the public release of their
immigration information at issue here, or otherwise in this litigation, Defendants generally do not anticipate that they
would oppose release, subject to minimal redactions, unless there was a statutory or other prohibition barring
Defendants from releasing it.

1 may also address some of the privacy interests of federal employees who may have protectable
2 information also reflected in those records.

3 **B. As an alternative to sealing, this Court should redact or partially seal certain**
4 **information**

5 As an alternative to sealing, Defendants also considered redacting or partially sealing parts
6 of the relevant exhibits. To protect federal employees against harassment and doxing, certain
7 information may be redacted or sealed. As indicated above, the parties have reached a general
8 agreement to redact the names and other PII of non-public, lower-level ICE employees and are
9 working to execute it. Defendants' proposals to redact or seal this information are reflected in the
10 Appendix to the Guadian Declaration, filed under seal. Once the parties reach a final agreement,
11 Defendants will update the Court.

12 However, for the privacy interests of non-parties in their own personal immigration
13 information, this less restrictive alternative does not appear sufficient. Defendants endeavored to
14 propose possible partial sealing recommendations, also reflected in the Appendix to the Guadian
15 Declaration. But this does not appear to be a workable solution. Given the context of the Plaintiffs'
16 opposition focusing on individual immigration cases, the public would be able to determine the
17 identity of the individual non-party if only limited redactions are employed. Additionally, the
18 publicly filed Swift Declaration, Dkt. 167, may connect a non-party to the record at issue. And
19 more extensive redactions would not allow for release of the information Plaintiffs appear to rely
20 on for their opposition.

21 **C. Otherwise, Defendants request an order allowing these exhibits to be filed**
22 **under seal**

23 Should this Court not protect the records at issue consistent with Federal Rule 5.2 and
24 LCR 5.2, and/or if the federal-employee privacy interests are not protected by partial redactions
or partial sealing, Defendants respectfully request an order allowing these exhibits to be filed

under seal. Private immigration information is appropriate to seal. *See, e.g., Moreno et al., v. Cissna et al.*, 2:19-cv-321-RSL (April 2, 2019), Dkt. 29. Additionally, the reasons for protecting federal-employee privacy interests are well documented in the Guadian Declaration.

C. CONCLUSION

For the foregoing reasons, the Court should issue an order to protect the exhibits consistent with Federal Rule 5.2 and LCR 5.2 and/or partially redact or seal the personal information of non-public, non-high ranking ICE employees. Alternatively, this Court should issue an order sealing these exhibits.

DATED this 11th day of December, 2023.

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I certify that this memorandum contains 1,627 words, in compliance with the Local Rules.